LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
JUN 7 1974
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1839

WEST INDIA CARRIERS, INC.,
Petitioner,

vs.

TWENTY GRAND OFFSHORE, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Request for Summary Reversal

RICHARD F. RALPH
510 Northeast Airlines Building
Miami, Florida 33131
Attorney for Petitioner

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Argument	6
Conclusion	9

AUTHORITIES

Case	Page
Bisso v. Inland Waterways Corp., (1955) 349 U.S. 85	6
Boston Metals v. The Winding Gulf, et al., (1955) 349 U.S. 122	6
Bradley v. Lehigh Valley R.R. Co., (2d Cir., 1907) 153 F. 350	7
Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., (1963) 372 U.S. 697	6
Ferncliff, The, (D.C. Md., 1938) 22 F.Supp. 728	7
Fluor Western, Inc. v. G. & H. Offshore Towing Co., (5th Cir., 1971) 447 F.2d 35, cert. denied, 405 U.S. 922	6, 8
Hadji, The, (1884) 20 F. 875	7
Inman, et al., v. South Carolina Ry. Co., (1889) 129 U.S. 128	7

STATUTES:

46 U.S.C. § 1303(8)	7

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. _____

WEST INDIA CARRIERS, INC.,
Petitioner,

vs.

TWENTY GRAND OFFSHORE, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Request for Summary Reversal

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on April 12, 1974, and requests summary reversal.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 492 F.2d 679 (Adv.No.2, April 29, 1974) and is set forth at page 2 of the separate appendix filed herewith.

The opinion of the District Court for the Southern District of Florida is reported at 337 F.Supp. 262 and is set forth at page 22 of the separate appendix filed herewith. The opinions of the District Court denying Respondent's Motion for Summary Judgment and denial of Motion for Reconsideration is reported at 328 F.Supp. 1385 and is set forth at page 57 of the separate appendix filed herewith.

JURISDICTION

The judgment of the Court of Appeals is dated and was entered 12 April 1974, and is set forth at page 1 of the separate appendix filed herewith The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

WHETHER AN UNREGULATED, DOMESTIC, TOWBOAT TOWER MAY VALIDLY CONTRACTUALLY REQUIRE ITS TOW TO CO-INSURE THE TOWER AND SECURE A WAIVER OF SUBROGATION DESIGNED TO HAVE THE EFFECT AND WHICH, IF VALID, HAS THE EFFECT OF RELIEVING THE TOWER FROM LIABILITY FOR NEGLIGENT TOWAGE?

STATEMENT OF THE CASE

Petitioner, through its agent, executed a towage contract with the respondent prepared by respondent who admittedly had no tariff filing.

Petitioner's agent had secured price quotations from other towers but no proposed forms of contract and chose respondent on the basis of price.

In addition to express provisions disclaiming liability on the part of the tower, its vessels and employees, respecting the tow or cargo; express provision for the tow to indemnify the tower; and provision to insure any cargo on the tow naming the tower, the tug and its masters and crew as co-insureds together with a waiver of subrogation, it was further provided in pertinent part as follows:

> "(3) Owner [Twenty Grand, the tug owner] agrees to procure, pay for and maintain in full force and effect throughout the terms of this agreement, hull and machinery insurances in an amount at least equal to the value of the vessel and full form protection and indemnity insurance with a limit in the amount of at least one million dollars ($1,000,000.00). Principal shall be named as an additional assured in all of said policies and such policies shall contain a waiver of subrogation in favor of principal.
>
> Principal [West India Carriers, Inc., the barge owner] agrees to procure, pay for and maintain in full force and effect through the term of this agreement, hull and machinery insurance in an

amount at least equal to the value of the barge and full form protection and indemnity insurance with a limit of at least one million dollars ($1,000,000.00). Owner, the vessel, its master and crew shall be named as additional assureds in all of said policies and such policies shall contain a waiver of subrogation in favor of owner, the vessel, its master and crew.

Proper evidence of such insurance shall be furnished owner."

Respondent tower admittedly (Record below 441-442; Appendix below 10-11) designed the provisions for the tow to insure it, the vessel, and its employees and to secure an express waiver of subrogation from the insurers to eliminate claims against the tower as Respondent would pay higher premiums based on adverse loss experience.

Petitioner's claims arose against Respondent due to the parting of Respondent's tow line and represented great physical damage to its large barge constituting the tow and indemnity for the cost of successfully defending itself against salvage claims and claim by the owner of beach groins with which the barge came into contact.

Petitioner did not co-insure Respondent or secure waivers of subrogation from Petitioner's insurers.

At the time of trial Petitioner had received advancements from its insurers made pursuant to loan receipts. The balance of the property damage repairs had been advanced by Petitioner including litigation expenses.

The towage contract contemplated domestic towage and expressly provided that it be construed and performance be determined in accordance with the laws of the United States.

It also provided for unilateral termination by either party on 15 days notice and that if the tow failed to perform any of its duties or obligations thereunder, Respondent could withdraw its vessel.

Respondent was held liable for negligence in the District Court the evidence clearly and bluntly showing Respondent had no maintenance program including any record keeping respecting the tow cable which parted due to deterioration. These findings of negligence were not questioned on appeal.

The Respondent contended in the District Court that the co-insuring waiver of subrogation provisions were valid; the breach of which by Petitioner estopped Petitioner from recovering from Respondent those matters which were covered by Petitioner's insurance and in which Respondent was not named as a co-insured and in reference to which no waiver of subrogation was secured.

The District Court rejected the validity of the asserted insuring clause and with it the premise of breach and estoppel Respondent contended for.

The Court of Appeals held the clause valid and enforceable and reversed the District Court.

ARGUMENT

Petitioner submits that the decision and judgment of the Court of Appeals for the Fifth Circuit is squarely in conflict with the holdings of this court in **Bisso v. Inland Waterways Corp.** (1955) 349 U.S. 85; **Boston Metals v. The Winding Gulf, et al.** (1955) 349 U.S. 122; and **Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.** (1963) 372 U.S. 697; because the effect of such clauses if voluntarily performed by insurors who are non-parties to the towage agreement has been held by the Court of Appeals for the Fifth Circuit to effectively bar a recovery from the tug owner, **Fluor Western, Inc. v. G. & H. Offshore Towing Co.** (5th Cir. 1971) 447 F.2d 35, cert. denied, 405 U.S. 922. In addition, the co-insuring tow, if the clause is valid, would be precluded from suing its co-insured for whom it secured the insurance.

On the other hand, if the clause is valid and enforceable as held by the Court of Appeals here, failure to perform results in a contractual estoppel and the tower escapes responding for its negligence either in terms of increased costs of insurance, or uninsured liability. In the instant case it makes no difference that Petitioner is the real party in interest or whether an insurer by way of subrogation were the real party in interest. Under the holding of the Court of Appeals the admitted purpose and device of the tower to escape liability is realized.

The decision and judgment of the Court of Appeals is likewise in direct conflict with the decisions of this court, of Court of Appeal, and District Courts holding that provisions requiring insurance so as to relieve the intended beneficiary of liability for its own negligence

are exculpatory in nature, contrary to public policy and unenforceable as against public policy, **Inman, et al. v. South Carolina Ry. Co.** (1889) 129 U.S. 128; **Bradley v. Lehigh Valley R.R. Co.** (2d Cir. 1907) 153 Fed. 350; **The Ferncliff** (DC Md. 1938) 22 F.Supp. 728; **The Hadji** (1884) 20 Fed. 875.

The towers continue to borrow contractual devices long since condemned in the carriage of cargo to escape liability for their own negligence as condemned by the decisions of this court.

Even limited benefit of insurance clauses respecting insurance voluntarily taken out in the absence of a contractual provision purportedly compelling such insurance, previously condoned, have been legislatively condemned within the purview of the United States Carriage of Goods by Sea Act, 46 U.S.C. §1303(8).

The decision and judgment of the Court of Appeals again raises important questions thought to have finally been placed to rest in the prior decisions of this court and to be relied upon in dealing with towers.

Clearly, the more careful the tower the more competitive his price and service unless his poor loss record and service can be avoided by shifting it and responsibility to another. The latter was the admitted avowed purpose of the clause the Court of Appeals has approved.

The statement of the Court of Appeals that there was a fair arms-length negotiation culminating in a towing agreement which neither by indirection nor otherwise relieves the tug owner or the towboat of its liability to

the barge owner as a result of the towboat's negligence is in every respect contrary to the prior decisions of this court and the record in this case.

Petitioner, and others, in the business and legal community, have relied upon the prior decisions of this court condemning provisions having the effect of relieving a non-regulated, non-tariff filing, domestic tower from its legal liability for negligent towage as here given effect by the Court of Appeals.

While the denial of a petition for a writ of certiorari is not to be considered approval, no tow can reasonably be expected to assume the risk of continuing to consider such clauses as invalid and ineffective so long as the instant decision of this Court of Appeals having jurisdiction over one of the largest coastal and inland waterway areas of this country remains.

Absent the compulsion and default of uncertainty, which this court should now resolve, the **fait accompli** circumstances of **Fluor Western, Inc. v. G. & H. Offshore Towing Co.** (5th Cir. 1971) 447 F.2d 35, cert. denied, 405 U.S. 922 will disappear and the liabilities of the tower for its negligence, including the ability to insure and the cost thereof, will be visited on the negligent tower.

CONCLUSION

The question presented has arisen by virtue of a decision and judgment squarely in conflict with prior decisions of this court and lower courts and raises again matters of importance which should be settled by this court. For the foregoing reasons, this Petition for Writ of Certiorari should be granted with consideration of Petitioner's request for summary reversal.

Respectfully submitted,

RICHARD F. RALPH
510 Northeast Airlines Building
Miami, Florida 33131
Attorney for Petitioner

LIBRARY
SUPREME COURT, U. S.

FILED
JAN 7 1974

In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1839

WEST INDIA CARRIERS, INC.,
Petitioner,

vs.

TWENTY GRAND OFFSHORE, INC.,
Respondent.

Appendix on Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RICHARD F. RALPH
510 Northeast Airlines Building
Miami, Florida 33131
Attorney for Petitioner

MIAMI REVIEW — 371-4663 — 377-3721

APPENDIX INDEX

	Page
Judgment, Court of Appeals	1
Opinion, Court of Appeals	2
Memorandum Opinion, District Court	22
Orders Denying Motion for Summary Judgment and For Reconsideration, District Court	57

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1973

No. 72-3314

D. C. Docket No. CA 70-591

Complaint of TWENTY GRAND OFFSHORE, INC., Etc.,

TWENTY GRAND OFFSHORE, INC.,
Plaintiff-Appellant,

versus

WEST INDIA CARRIERS, INC.,
Claimant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

Before GODBOLD, DYER and GEE, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed;

It is further ordered that claimant-appellee pay to plaintiff-appellant, the costs on appeal to be taxed by the Clerk of this Court.

April 12, 1974

GODBOLD, Circuit Judge (specially concurring):
Issued as Mandate:

Complaint of Twenty Grand Offshore, Inc., etc.

TWENTY GRAND OFFSHORE, INC.,
Plaintiff-Appellant,
v.
WEST INDIA CARRIERS, INC., Claimant-Appellee.

No. 72-3314.

United States Court of Appeals,
Fifth Circuit.

April 12, 1974.

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, DYER and GEE, Circuit Judges.

DYER, Circuit Judge:

The question posed by this appeal is whether the provisions of a towage contract, requiring the owners of a tug and tow to fully insure their respective vessels and

to obtain in each of the policies a waiver of subrogation and a designation of the other party as an additional insured, are invalid and unenforceable as exculpatory clauses contrary to public policy. The district court found the towage contract invalid and entered judgment for the tow. We disagree and reverse.

On the evening of October 30, 1969, the tug EL MULO GRANDE, owned by Twenty Grand Offshore, Inc., had the barge WISCO RANGER under tow. Four miles offshore of Hollywood, Florida, the tug and tow apparently encountered heavy weather. During the storm, the towing hawser parted, and the barge WISCO RANGER, driven by the seas and waves, stranded on the beach. Subsequently, in a limitation proceeding, the district court denied the tug owner exoneration from or limitation of liability, found negligence and privity, and awarded the barge owner damages.[1] The finding of negligent towage is not contested on appeal.

The heart of the controversy is whether, by virtue of the provisions of the towing agreement and the circumstances existing at the time of its execution, the agreement is valid and enforceable, or whether it is within the parameters of Bisso v. Inland Waterways Corp., 1955, 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911, which prohibits a contractual exemption of a towboat owner from responsibility for his own negligence.

The towing agreement sub judice provides in pertinent part as follows:

---

[1]The barge owner's insurance company has reimbursed the barge owner $120,000 and is, at least to this extent, the primary party in interest.

(3) Owner [Twenty Grand, the tug owner] agrees to procure, pay for and maintain in full force and effect throughout the term of this agreement, hull and machinery insurances in an amount at least equal to the value of the vessel and full form protection and indemnity insurance with a limit in the amount of at least one million dollars ($1,000,000.00). Principal shall be named as an additional assured in all of said policies and such policies shall contain a waiver of subrogation in favor of principal.

Principal [West India Carriers, Inc., the barge owner] agrees to procure, pay for and maintain in full force and effect through the term of this agreement, hull and machinery insurance in an amount at least equal to the value of the barge and full form protection and indemnity insurance with a limit of at least one million dollars ($1,000,000.00). Owner, the vessel, its master and crew shall be named as additional assureds in all of said policies and such policies shall contain a waiver of subrogation in favor of owner, the vessel, its master and crew. Proper evidence of such insurance shall be furnished owner.[2]

---

[2]The towing agreement also contained the following clause: Anything to the contrary notwithstanding, [n]either Owner, the vessel, its Master or crew shall be liable for loss of or damage to the cargo, the barge or equipment aboard the tow, however arising, including but not limited to errors in navigation or management of the vessel, fire or explosion, or defect in the hull, machinery and equipment of the vessel or unseaworthiness thereof, or the negligence of the Owner or otherwise. The Principal agrees to protect, defend, hold harmless, and indemnify Owner, the vessel, its Master and crew of and from any claims, suits, actions, liability, loss or damage to the cargo, the barge or equipment aboard the tow however arising, whether

The facts and circumstances surrounding the execution of the towing agreement are largely undisputed. Twenty Grand Offshore, Inc., the tug owner, is the wholly owned subsidiary of Tidewater Marine Service, Inc. It is one of eight to ten offshore towboat companies operating along the Gulf Coast and eastern coast of the United States. States Marine Lines, Inc., the owner of the barge WISCO RANGER, owns steamships and barges and is an affiliated corporation of West India Carriers, Inc., which was the demise owner, under a bareboat charter of the barge.

The barge owner solicited bids from several towboat companies to enter into a towing agreement for the towage of the WISCO RANGER. The tug owner was selected on the basis of competitive price which was less than other prices submitted to the barge owner for the same service. One of the factors considered by the tug owner in arriving at its bid price was the inclusion of Clause 3 in the towing agreement, since the price for the towage would have been greater without Clause 3 in the agreement. In other towing agreements the tug owner had agreed to the elimination of Clause 3 but only with an increase in the towing rate.

---

through errors of navigation or management of the vessel, fire or explosion, defect in the hull, machinery and equipment of the vessel, or the unseaworthiness thereof, or the negligence of Owner or otherwise.

The tug owner disclaimed any reliance on this clause as being clearly within the reach of Bisso and offered to pay to barge owner whatever damages were not validly collected from barge owner's underwriters. Hence the only issue before the district court, after negligent towage was found, was the legal effect of Clause 3 of the towing agreement. This was the sole issue argued on appeal.

No contention was made or evidence introduced to show that there was a monopoly of the towboat market or that there was any form of monopolistic agreement among towboat operators. There was likewise a clear absence of any showing that the barge owner was overreached by the tug owner, or that the tug owner was in a position to drive hard bargains.

Notwithstanding barge owner's contractual obligation to do so, it was stipulated that barge owner failed to have tug owner or its tug named as an additional insured. In addition, the barge owner failed to obtain a waiver of subrogation from its underwriters, even though the underwriters had no objection to giving such a waiver.[3] On the other hand, tug owner did comply with its contractual obligation by having barge owner named as an additional insured and by securing a waiver of subrogation.

The district court found that the towage agreement was not exculpatory but that it was an indirect attempt at exculpation because the effect of the waiver clauses was "the same as the Bisso-invalid clauses." It recognized that the clauses present in Bisso were not insurance clauses but simply provided that the towing would be at "the sole risk" of the barge, and "that the tug's master, crew and employees would, in the performance of their duties, become 'employees' of the barge." Pointing out that the sole risk provision was found to be exculpatory and against public policy, the district court then focused on

---

[3]The barge owner's hull policy provided:

"The assured shall not be prejudiced by reason of any agreement limiting or exempting the liability of . . . tugs and/or towboats and/or their owners when the assured, . . . accepts such contracts in accordance with the established local practice."

the second, or imputed employees clause, which had again been invalidated in Boston Metals Co. v. The Winding Gulf, 1955, 349 U.S. 122, 75 S.Ct. 649, 99 L.Ed. 933, and analogized the indirect attempt to exculpate the tug by use of imputed negligence of an employee with the use of the insurance clauses sub judice, concluding that the Supreme Court forbade tug owners from doing indirectly what could not be done directly.

The barge owner supports the district court's conclusion by this syllogism: Bisso condemns any clause that is exculpatory in relieving the legal liability of a negligent tower; compulsory insurance clauses are exculpatory; compulsory insurance clauses are therefore condemned.

The tug owner responds that the insuring provisions in the towing agreement are not an indirect attempt to accomplish what Bisso prohibits; that they make no effort to, and indeed do not, regulate the rights of the tug and tow inter se. The clause does not prevent the barge owner from suing the tug owner or from obtaining a judgment against the tug owner. It simply precludes the barge owner's insurance company from suing and recovering from tug owner losses which it had paid or is obligated to pay to the barge owner on account of an insured casualty. The tug owner's liability to the barge owner is unaffected by the insurance clause. Finally, tug owner argues that public policy considerations cannot dictate which party to a contract pays the insurance premium and that that is all the clause in question requires.

It is obvious that this is not, as was Bisso, a "towing movement * * * at the sole risk of the barge," or the imputation of the employees of the tug to be the em-

ployees of the barge. Nevertheless, we are called on to determine whether the insurance clause here involved comes within the purview of the "judicial rule, based on public policy, invalidating contracts releasing towers from all liability for their negligence," keeping in mind that "[t]he two main reasons for the creation and application of the rule have been (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains." Bisso, supra, 349 U.S. at 90, 91.

Both the district court and the barge owner lean heavily on Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co., 1963, 372 U.S. 697, 83 S.Ct. 967, 10 L.Ed.2d 78, which reversed our holding that Bisso was inapplicable in the factual context of that case. Crescent Towing & Salvage Co. v. Dixilyn Drilling Corp., 5 Cir. 1962, 303 F.2d 237. In Crescent, the towing agreement provided that "any damage claims urged by third parties as well as any claim which may be urged by virtue of damages to the drilling rig in the course of the towage shall be for your account [the barge owner] and account of your underwriters." 303 F.2d at 241. This Court found no overreaching to drive a hard bargain. More importantly, we found that the other reason explicated in Bisso, i. e., to discourage negligence by making wrongdoers pay damages, was inapplicable to the facts in Crescent upon much the same ground as that expressed in Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corp., 1959, 360 U.S. 411, 79 S.Ct. 1210, 3 L.Ed.2d 1334. We quoted from that case as follows:

> If the peculiar hazards involved in towing a barge supplied by the shipper are great, and the methods of guarding against those hazards are uncertain, it may be that in an area where Congress has not, expressly or by fair implication, declared for a particular result, the federal courts should creatively exercise their responsibility for the development of the law maritime to fashion a particularized rule to deal with particularized circumstances. (Court's emphasis)

303 F.2d at 246. We then concluded in Crescent

> * * * that, under all the circumstances of this case, the Bisso rule is not applicable to prevent Dixilyn from indemnifying Crescent against third-party claims based on Crescent's negligence or to prevent Dixilyn from binding itself to afford Crescent the benefit of Dixilyn's liability insurance.

On certiorari, the Supreme Court found that this Court's holding in Crescent was squarely in conflict with Bisso and that our attempt to distinguish Crescent "because the peculiar hazards of towage and other factors" brought it within the ambit of Southwestern Sugar was invalid. The Court pointed out that "Southwestern Sugar is not applicable here, for in that case the Court merely preferred to give the Interstate Commerce Commission an opportunity to rule on an exculpatory clause which was a part of a tariff filed with the Commission." Dixilyn, supra, 372 U.S. at 698. Mr. Justice Harlan's concurring opinion highlighted the holding in Dixilyn: "Certainty in the law governing commercial transactions of this kind is an overriding consideration which would not be pro-

moted by opening the Bisso rule to indeterminate exceptions, in instances where, unlike Southwestern Sugar, no functions of a regulatory agency are involved." Id. at 698.

It would seem clear from Dixilyn that "peculiar hazards of towing" and similar "indeterminate exceptions" contained in exculpatory clauses cannot be utilized to undercut the adjuration of Bisso. But that is not this case.

Here there was a fair, arm's length negotiation culminating in a towing agreement which neither by indirection nor otherwise relieves the tug owner or the towboat of its liability to the barge owner as the result of the towboat's negligence. The barge owner could have sued the tug owner if the insurance underwriters had, for whatever reason, failed to pay. Indeed, it is admitted that the tug owner is liable for damages sustained as the result of loss of use of the barge, as well as any other losses not covered under the policy.

Under the circumstances of this case we must determine if the Bisso doctrine is so encompassing that in instances of fair dealing, with no anti-competitive forces at work, the parties to a towing contract cannot agree to include an insurance clause and thereby reduce the towing rate while not affecting the rights of the tug and barge inter se, or eliminate the clause and accomplish the towing at a higher rate. We are of the view that Bisso contemplated no such expansive interpretation.

The simplistic, syllogistic approach of the barge owner is inviting because we agree with the major premise that Bisso condemns exculpatory clauses that relieve the legal liability of a negligent tower. But the minor premise that

compulsory insurance clauses[4] are exculpatory per se in the context of Bisso, is unsound. Such a doctrinaire interpretation is not supported by the reasons undergirding Bisso.

This Court considered an analogous situation in Fluor Western, Inc. v. G & H Offshore Towing Co., 5 Cir. 1971, 447 F.2d 35, cert. denied, 405 U.S. 922, 92 S.Ct. 959, 30 L.Ed.2d 793. There the tower was sought to be held for the loss of the cargo resulting from the sinking of the barge being towed. The underwriters who insured the cargo paid the owner for its loss and thus the underwriters were the real party in interest. The tower urged that by virtue of a clause in the towing agreement between the tower and barge owner the cargo owner was required to carry full insurance on the cargo with a waiver of subrogation. The plaintiff countered that the contractual provision was meant to absolve the tower of responsibility for negligence and was void under the principles established in Bisso and Dixilyn. We rejected this argument. Because of the pertinency of what was there said, it bears repeating here:

> It appears that the overriding consideration in Bisso was the supposed inequality of the bargain position of the tug industry and those in need of its services. The other reason stated in Bisso for the rule there announced—to discourage negligence by making wrongdoers pay damages—was,

[4]The word "compulsory" as used to describe the insurance clause was coined by proctor for the barge owner as a word of art to differentiate the insurance clause *sub judice* from clauses giving the benefit of voluntary insurance. It is not used to demonstrate or imply that the barge owner is under any compulsion to obtain insurance without waiver of subrogation.

I believe, of limited importance and merely served to support the decision, for, in absence of an unconscionable disparity in bargain positions, contracting parties should be free to distribute liabilities and costs as they wish.

* * *

* * * Unlike the situation in Bisso, the plaintiff did not waive its right to proceed against any party responsible for the cargo loss. Although the cargo owner, pursuant to the contract, procured insurance fully covering the cargo being shipped, and presumably was reimbursed by insurance proceeds for the loss incurred, it nevertheless had the right to proceed against the barge, tug and their owner, charterers and operators if the insurance underwriters had, for whatever reason, failed to pay. With respect to the rights of the cargo owner, the carriage contract did not exculpate these potential defendants, protect them from suit by the cargo owner, or fix their respective liabilities, * * *

* * * Actually, no rights at all were waived by the carriage agreement itself. The cargo owner agreed to procure cargo insurance with a waiver of subrogation clause, but the insurance underwriters' subrogation rights were waived only by a later and independent agreement reached between the cargo owner, as the insured, and the underwriters. It is not alleged that the execution of the carriage agreement bound any insurance underwriters in any manner at all. It is difficult to imagine how any monopolistic condition that

> may have existed in the tug and barge industry could have been exploited to compel the underwriters to agree to waive their rights of subrogation. * * *
>
> * * * The only thing that could conceivably have been adhesive in the towage contract involved here would be the cargo owner's agreement to pay the premiums of the insurance that was to be procured. I do not think, however, that the public policy expressed in Bisso requires that any particular party should necessarily bear the cost of such insurance, particularly when the party that does bear the cost had an insurable interest in the cargo and is to be the named insured, as is the case with the plaintiff in this suit. See, Great American Insurance Co. v. Gulf Marine Drilling No. 1, 302 F.2d 332 (5th Cir. 1962).

The barge owner acquiesces in the holding of Fluor Western only so far as it was predicated on the finding that the insurance company was the real party in interest as subrogee and, having acted voluntarily as a non-party to the towing agreement, was bound thereby. The holding that the clauses were not exculpatory and hence not invalid is denigrated by barge owner as dictum. Moreover, it is argued, that since the insurer waived subrogation it, as the real party in interest, could not later pursue the tower. Finally, both the barge owner and the district court draw a distinction between Fluor Western and this case because that decision involved a cargo loss, while here the loss of the barge itself is of concern.

We can discern no basic difference between Fluor Western and this case. The fact that it involved cargo

insurance and cargo damage rather than barge insurance and barge damage is a distinction without a difference. Fluor Western, as does the instant case, involved a towing agreement, and simply because cargo laden aboard the tow was damaged rather than the tow itself can conceptually make no difference. Likewise, the record in this case shows indisputably that the barge underwriters have paid at least $120,000 and thus must be the real party in interest. We confess our inability to comprehend barge owner's rationale of Fluor Western, that if the towing agreement provides for a waiver of subrogation, which is ipso facto invalid under Bisso, and the barge's underwriters have not waived subrogation, it or the barge may pursue the tower, but notwithstanding the invalidity of the towing agreement provision, if the barge's underwriter has waived subrogation it may not pursue the tower. Said another way, if the barge complies with its contractual obligation to effect a waiver of subrogation it may not sue the tower, but if the barge breaches its contractual obligation to effect a waiver of subrogation it is free to pursue the tower.

We are of the view that the ratio decidendi of Fluor Western is fully applicable and controlling in this case. We thus deem it inutile to consider cases involving different legal principles concerning common carriage and the relationship between carriers and shippers.

We conclude that the provision in the towing agreement requiring each party to fully insure its vessel, to effect a waiver of subrogation, and to name the other party as an additional insured is not an exculpatory clause of the type invalidated in Bisso and Dixilyn.

Reversed.

GODBOLD, Circuit Judge (specially concurring):

Because we struggle in this case, as others have, to accommodate Bisso[1] to the context in which towboat and barge seek to decide by contract who will bear the cost of insurance, it may be useful for me to state in a separate opinion my views and process of reasoning. If free to do so, I could with comfort hold that, at least absent monopolistic compulsion, towboat and towed vessel can bargain as they wish over both allocating the cost of insurance and concomitantly releasing from liability for negligence.[2]

But the fly in the ointment is Crescent Towing & Salvage Co. v. Dixilyn Drilling Co., 372 U.S. 697, 83 S.Ct. 967, 10 L.Ed.2d 78 (1963), a per curiam decision which reversed, citing Bisso, the decision of this court, 303 F.2d 237 (C.A.5, 1962). The clause involved stated:

> It is particularly understood and agreed that you are authorized to and by this agreement do release and relieve us from any liability for account of your underwriters and that any damage claims urged by third parties as well as any claim which may be urged by virtue of damage to the drilling rig in the course of the towage shall

[1]Bisso v. Inland Waterways Corp., 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955).

[2]Even where the tower has monopoly power, it is by no means clear that Bisso serves much purpose. To the extent that the tower has such power he has the ability to pass on to the barge in the form of an increase in price his cost of insurance. Thus, preventing the tower from contractually assigning to the barge the responsibility for obtaining insurance may accomplish no change in payor but only a transformation in the form in which the barge pays for the insurance—price for towage rather than payments to the insurance company.

> be for your account and for the account of your underwriters.
>
> It is further understood that the amount of the insurance protection which you have in force equals the value of the hull of the barge as to hull insurance and amounts to four million dollars as to third party claims.

The Supreme Court treated this as "a contract which exempts the tower from liability for its own negligence" in violation of Bisso. In essence Dixilyn (towed) agreed to indemnify Crescent (towboat) for third party claims arising from Crescent's negligence. It appears to me that the agreement did not contemplate that the liability to third parties would ultimately rest on Dixilyn, at least where, as was the case, the liability did not exceed $4,000,000. At first glance this looks about as much like an insurance clause as does the present contract. My Brother Dyer's distinction is that the Twenty Grand contract does not "relieve the tug owner or the towboat of its liability to the barge owner as the result of the towboat's negligence," since the barge could sue the tower if the insurer fails to pay.

I believe this distinction is sound. It is not simply one between situations where the tower remains liable and upon the happening of certain contingencies will have to pay and situations in which the tower has attempted to completely eliminate his liability. The contract in Crescent Towing related to third party claims, and the tower's liability to third parties could not be affected by an agreement between the tower and the barge—if the barge or its insurers failed to pay, the third party could go against the negligent tower. Rather the distinction is between

contracts by which the barge agrees to assume liability for the towboat's negligence and contracts by which the barge simply agrees to provide an insurer to protect the towboat from some of the financial consequences of liability. In Crescent Towing the barge agreed to indemnify the tower against the tower's own negligence and coupled that agreement with a commitment to procure insurance assuring the barge's ability to do so. In the instant case the barge agreed to procure insurance naming the tower as an assured and thereby to provide a third party, the insurer, who would protect the tower from the consequences of its own negligence. The difference between the two cases may initially appear slight, but it is functionally important.

In agreements of the Crescent Towing type, where the barge acts as the indemnitor and procures insurance primarily to protect itself, it is possible that the barge's agreement to indemnify may be more inclusive than the insurance coverage which the barge agrees to procure and that, consequently, the barge will be liable for damages in excess of the insurance coverage or even for the entire amount if the insurer is defunct or will not pay. The risk that barge owners might accept Crescent Towing-type clauses in the erroneous belief that they are accepting only the responsibility for procuring insurance may perhaps justify applying Bisso to void such agreements. But in the present agreement this risk is absent, because the responsibility for any liability beyond the insurance which West India Carriers contracted to procure remains on Twenty Grand, the tower. Thus to the extent that one of the Bisso rule's functions is to protect the barge owner, the rule plays a part in Crescent Towing which it cannot play here.

Beyond protecting barge owners, Bisso contains a second avowed policy prong, "to discourage negligence by making wrongdoers pay damages." Neither Bisso nor Crescent Towing, dealing as they did with situations in which a barge rather than a third party insurer had agreed to be the indemnitor, addresses the issue of the impact of liability insurance upon this analysis. The Bisso statement does not and never has meant literally what it says. If it did then Bisso would bar the tower from avoiding responsibility for paying damages from his own pocket through the means of purchasing his own liability insurance. Although for a time in the early decades of this century judges in some dry land jurisdictions were inclined toward invalidating liability insurance contracts as contrary to public policy,[3] we have long since decided that the benefits afforded by the availability of such insurance outweigh whatever weakening of the deterrent impact of negligence law may flow from that availability. The discouraging of negligence to which Bisso refers must, therefore, relate in the present case to the incentive to careful operation provided by the threat of increased insurance premiums which would result from careless operation, and it is relevant to inquire whether the contract in issue will significantly reduce that incentive. I believe that it does not. Barge owners, when confronted with proposed towage contracts under which they agree to procure insurance protecting the tower, will consider how much that insurance will cost and will take the cost into account in selecting a tower. Whether by purchase of a special policy or

[3]See, e.g., Coffman v. Louisville & N. R. Co., 184 Ala. 474, 63 So. 527 (1913); Employers' Liability Assur. Corp., Ltd. v. Kelly-Atkinson Const. Co., 182 Ill.App. 372 (1913); Aetna Life Ins. Co. v. Weck, 163 Ky. 37, 173 S.W. 317 (1915); Standard Life & Acc. Ins. Co. v. Bambrick Bros. Const. Co., 163 Mo.App. 504, 143 S.W. 845 (1912); In re Aldrich, 86 Vt. 531, 86 A. 801 (1913). See generally, W. Prosser, Handbook of the Law of Torts 542-543 (4th Ed. 1971).

extension of the barge owner's existing policy to a tower (as appears to be the case here) the barge owner can anticipate that sooner or later his pigeons will come home to roost. If he furnishes insurance to careless towers, he can expect an ultimate, if not an immediate impact upon his premium rates. Absent monopoly in the towers' market, barge owners will have a choice of towers, and, other things being equal, they will avoid the tower who is a bad negligence risk, and competition among towers will provide the incentive for safe operation that would be provided by the threat of increased premiums to the tower itself.

Additionally, to find this contract invalid as against a public policy of discouraging negligence would, for no apparent reason, be a result at odds with the analysis employed in similar cases where shippers extend to carriers the benefit of the shippers' insurance on goods shipped. In Great Lakes Transit Corp. v. Interstate S. S. Co., 301 U.S. 646, 57 S.Ct. 915, 81 L.Ed. 1318 (1937), the court had before it an insurance contract by which a shipowner had insured against damage to cargo which it carried as a common carrier. The cost of the insurance was included in the rate charged shippers. Through the negligence of the shipowner, cargo was damaged. The insurance company paid the shippers and thereafter sought to recover part of its payment from the shipowner on the theory that even though the insurance named the shipowner as an assured, the insurance was ultimately paid for by and for the benefit of the shippers and, therefore, the insurer was subrogated to the rights of the shippers against the carrier. The court rejected this argument noting,

> The underwriters seek to sustain the decree by invoking the doctrine of subrogation, but the equity of subrogation invests the underwriters with the rights of the assured against third persons [citations omitted], not with a right to override its own obligation to the assured. Thus, when a bill of lading provides that in a case of loss the carrier, if liable therefor, shall have the full benefit of any insurance effected upon the goods, the provision limits the right of subrogation of the insurer, upon payment to the shipper, to recover over against the carrier. [Citations omitted.] Such a clause giving the carrier the benefit of insurance effected by the shipper is valid "because the carrier might himself have insured against the loss, even though occasioned by his own negligence; and if a shipper under a bill of lading containing this provision effects insurance and is paid the full amount of his loss, neither he nor the insurer can recover against the carrier." Luckenbach v. W. J. McCahan Sugar Ref. Co., 248 U.S. 139, 146, 39 S.Ct. 53, 54, 63 L.Ed. 170, 174, 1 A.L.R. 1522.

301 U.S. at 654, 57 S.Ct. at 918, 81 L.Ed. at 1323-1324. The instant case appears to present a similar situation. The barge was to procure insurance and extend the benefit of that insurance to the towboat by having the tug and its owner named as an additional assured and by obtaining a waiver of subrogation from the barge's insurer. Had it done so and had the insurer then sought recovery against the towboat on the theory that such an extension of insurance benefits was invalid under Bisso, I believe that we could properly refuse to allow recovery on the strength

of the analogy to a shipper's extending the benefits of his cargo insurance to a water carrier. Indeed, we have previously refused to allow a cargo insurer to obtain recovery from a towboat where, pursuant to a contract with the towboat, a cargo owner obtained cargo insurance containing a waiver of subrogation. Fluor Western, Inc., v. G. & H. Offshore Towing Co., 447 F.2d 35 (C.A.5, 1971). I find no reason to treat the instant case as distinctive because it involves damage to a barge rather than damage to cargo. Nor do I believe that this barge or its insurer should be rewarded because the barge failed to perform its contractual obligation.

In Crescent Towing, Justice Harlan, while expressing his conviction that Bisso was wrongly decided, cautioned against the hazard of creating indeterminate exceptions to the Bisso rule. Certainty in rules of law governing commercial transactions is clearly desirable. Our decision in this case is consistent with that goal. If pushed to extremes, the deterring negligence rationale of Bisso would demand that towers be barred from insuring themselves against negligence at all. But Bisso has never been so interpreted, and the question, therefore, is not whether to draw a line at all but where to draw it. I believe that the line can, consistent with reason, precedent, and existing business practices, be drawn between valid agreements, such as the one here, which operate purely to allocate the responsibility for obtaining insurance, and agreements, such as the one condemned in Crescent Towing, which go further and seek to shift to the barge the primary responsibility for damage not covered by insurance.

James CRAWFORD, for himself and for Deuel (Hap) Veerkamp, Plaintiff,

v.

WEST INDIA CARRIERS, INC., a corporation, Defendant.

HASAM REALTY CORP., a Delaware corporation, Plaintiff,

v.

TUG EL MULO GRANDE, her engines, etc., Twenty Grand Offshore, Inc., a Louisiana corporation, Non-propelled WISCO RANGER, her tackle, etc., West India Carriers, Inc., a Florida corporation, Defendants.

Complaint of TWENTY GRAND OFFSHORE, INC., Plaintiff, Owner of TUG EL MULO GRANDE, Official No. 505240, in an action for exoneration from or limitation of liability, Plaintiff-Petitioner.

Nos. 70-231-Civ.-CF, 70-342-Civ.-CF and 70-591-Civ.-CF.

United States District Court, S. D. Florida.

Nov. 30, 1971.

MEMORANDUM OPINION

FULTON, Chief Judge.

Captioned causes are within the admiralty and maritime jurisdiction of this Court. Although separately filed,

they were consolidated for trial. After receiving and carefully considering all of the evidence adduced in the consolidated trial, the Court enters this memorandum opinion in lieu of particular Findings of Fact and Conclusions of Law, as required by Rule 52 of the Federal Rules of Civil Procedure.

SAGA OF THE SEA

About ten o'clock on the evening of October 30, 1969, the tug El Mulo Grande, owned and operated by Twenty Grand Offshore, Inc., was towing the barge Wisco Ranger, owned by States Marine Lines, Inc. and bareboat chartered to West India Carriers, Inc., on the northbound leg of a voyage from the Port of Palm Beach to Puerto Rico and return, the voyage having originated at the Port of Palm Beach on October 17, 1969.

While so proceeding, about four miles off the east coast of Florida in the vicinity of Hollywood, Florida, the tow and barge encountered heavy winds and seas, but not so severe as to be unusual or unexpected for that time of the year. At that time and place, the tow cable parted and the barge which was unmanned and without self propulsion or steering equipment was carried shoreward by prevailing winds and seas, until it drifted into shallow water in front of the Diplomat Hotel and Country Club.

The hotel facility was owned and operated by Hasam Realty Corporation. After the tow cable separated, the tug brought its end of the cable aboard and its crew searched for and located the barge, which by that time was in such shallow water that it could not be taken into tow. During the night, while in front of the hotel, the barge came in con-

tact with three of the hotel's beach groins which extended easterly into the Atlantic Ocean from the beach, with the result that both the barge and the groins were substantially damaged.

While thus imperiled, the barge was boarded by Crawford and Veerkamp who activated the hydraulic pumping system, turned some valves and dropped the port anchor in an effort to ground and immobilize the barge. The next afternoon the crew of the tug, assisted by a marine surveyor and professional salvors, were able to take the barge in tow and remove her from the shallow water to safety at Port Everglades, Florida. The events just related gave rise to captioned litigation.

THE PARTIES AND ISSUES

For brevity, the parties will hereinafter be referred to as follows:

TWENTY GRAND OFFSHORE, INC., as "TWENTY GRAND"
WEST INDIA CARRIERS, INC., as "CARRIERS"
CRAWFORD AND VEERKAMP as "SALVORS"
HASAM REALTY CORP. as "HASAM"
EL MULO GRANDE as "THE TUG"
WISCO RANGER as "THE BARGE"

Although each of the causes will be dealt with separately and more exhaustively, at this juncture each cause will be briefly described.

70-231-Civ-CF was instituted by Crawford and Veerkamp against Carriers, claiming that they were salvors, who had rendered services in protecting the barge

from greater damage. In this cause, Carriers counter-claimed contending that their efforts did not benefit the barge but caused damage.

In 70-342-Civ-CF, Hasam sought recovery against Twenty Grand and Carriers for damage to the groins. Carriers counter-claimed contending that Crawford was an employee of and was acting for and in behalf of Hasam when he boarded the barge and damaged it.

70-591-Civ-CF is an action instituted by Twenty Grand seeking exoneration from or limitation of liability. In this proceeding, Carriers asserted a claim for damages to the barge and Hasam asserted a claim for damage to the groins; and Carriers sought indemnity from Twenty Grand upon the claims of Hasam and the Salvors.

In addition to the foregoing, Dade Drydock Corporation filed a claim against Twenty Grand claiming that, several days after the casualty, the tug negligently maneuvered the barge in a way to cause the barge to strike and damage a syncrolift of the drydock. Happily, the issues thereby presented need not be considered because that claim has recently been compromised and settled by the parties.

TRIAL PROCEDURE

When the causes were called for trial, counsel jointly announced that they had agreed and stipulated that the total of all of the claims could not exceed the value of the tug, or a fund substituted therefor, and that so much of the petition of Twenty Grand as sought limitation was then moot.

Thereupon, counsel for Twenty Grand urged that the issue which the petition presented for exoneration was nothing more than a denial by Twenty Grand of liability upon the claims which had been asserted and that Twenty Grand should be relieved of the burden of going forward with the evidence and should be permitted to withhold the presentation of its evidence until after the claimants had proceeded, to which the claimants took violent exception.

Prior to the trial, the consolidated cases were jointly pretried on several occasions, exhaustively. A format was developed for the trial whereby Twenty Grand as petitioner would proceed with its evidence and claimants would follow, as is the usual sequence for such cases in this Court. It appeared that counsel had arranged for the attendance of witnesses and otherwise planned for the trial on a basis of Twenty Grand going forward, and it was urged that a last minute change in the sequence would result in some delay of the trial and inconvenience to claimants.

The Court abided the trial format, as developed at the pretrial conferences, and required Twenty Grand to proceed first. The order of presentation of evidence was completely inconsequential because the case was tried very informally, with witnesses being taken out of order for the convenience of counsel, and with each party being afforded a full opportunity to be heard. The rulings set forth in this memorandum opinion would be the same regardless of the order of the presentation of evidence.

THE SALVAGE CLAIM

The claim for salvage will be dealt with first. This claim was instituted by Crawford for himself and for the

use and benefit of Veerkamp. At the trial, the claim was amended to give Veerkamp the status of a co-plaintiff. In defense of the salvage claim, Carriers contend that the efforts of the Salvors did not contribute to the preservation of the barge nor in any way deliver it, even partially, from its perilous predicament. On the other hand, Carriers claim that by unskillfully activating the barge's pumping system and turning various valves, the Salvors caused sand and shell to be sucked into the pump and sea chest strainers, thereby clogging and damaging the same, for which damage Carriers counter-claimed. In addition, Carriers sought indemnity from Twenty Grand for any liability to Crawford and Veerkamp as a result of the claim for salvage.

Crawford was the resident engineer of the Diplomat Hotel. About eleven o'clock on the evening of October 30, he was advised that a vessel was adrift east of the hotel property. At that time it was raining and there was considerable wave action in the surf. Although visibility was limited, Crawford testified that he was able to see the barge in shallow water in front of the hotel. Crawford immediately called the president and general manager of Hasam, both of whom came and were present at the scene. When first observed, the barge was mistakenly thought to be a tanker. Crawford and the hotel officers were apprehensive that oil would be spilled upon the hotel property. The City Fire Department and the City Manager were contacted and advised of the presence and the peril of the vessel, and a request was made for assistance.

In front of the hotel there was a system of four groins which Hasam had constructed from the upland into the ocean, to accumulate sand and maintain a beach. During the trial, and in this opinion, these four groins were and

are identified and referred to by consecutive numbers, 1 through 4, with the most northerly groin being No. 1 and the most southerly groin being No. 4. Each groin extends from the beach easterly into the ocean for a distance of 200 feet. The groins are approximately 250 feet apart and each is about one and one half feet in width. The groins were constructed of a series of regularly spaced greenheart timbers driven into the floor of the ocean and held in place by steel interlocked sheeting, which was also driven into the sea bed, all of which was secured by bolted wooden timbers called whalers. The tops of these groins extended above the level of the water.

When the barge was first sighted by Crawford, it was in contact with groin No. 1. Crawford testified that within an hour he observed that the barge had moved upon groin No. 2 and was approaching groin No. 3. He described the course of the barge as being southwesterly. At this time, with Hasam's president and general manager observing, Crawford and a reservations manager of the hotel, whose identity was not revealed, were able to crawl along groin No. 3 to the side of the barge and to board her, by use of a rope ladder provided by the City Fire Department.

After investigating the decks and certain compartments, Crawford was able to activate the generator and turn on the lights of the barge, from stem to stern. Shortly thereafter, the reservations manager disappeared, presumably having returned to shore, unnoticed by Crawford. Crawford testified that the stern of the vessel was then over groin No. 3 and that the barge was not then moving, except that the bow was swinging slightly from east to west with the wave action. Believing that the vessel was grounded, Crawford departed the barge and made his way

back to shore. He testified that he was exhausted by the ordeal and that he went to bed in the hotel and slept until approximately 2:30 a.m., when he was awakened by someone who told him the barge was again adrift.

At this point, Veerkamp, who was a reporter for a local newspaper, agreed to accompany Crawford in reboarding the barge. After they were aboard, Veerkamp found a crowbar, or some similar device, with which a hatch was pried open and entry was made into the compartment which housed the hydraulic pumping gear of the barge. Within this compartment, Crawford found a manual for the operation of the pumping system. He testified that by use of the operational manual he was able to start the pump and open valves; and that salt water was pumped into the stern ballast tanks and that the stern of the barge was thereby grounded. He testified that then, by the use of the same hydraulic power, he was able to lower the port anchor and immobilize the bow of the vessel. The testimony of Veerkamp with respect to these operations was substantially the same as that of Crawford. Unlike Crawford, Veerkamp was very modest and personable. His testimony was free from exaggeration and he was found to be entirely credible.

Apparently, Veerkamp had a deadline at the newspaper for a news article. He departed and went ashore for that purpose. Crawford remained aboard until sometime that afternoon, when the barge was taken in tow by the El Mulo Grande for removal to Port Everglades. Crawford, who obviously had the facilities of the hotel at his disposal, was able to produce at the trial a motion picture of the barge as she laid in the surf in front of the hotel. He also produced a series of still photographs which were taken

over a period of hours. By happenstance, the movie and the stills showed Crawford on the deck of the barge.

In support of their claim the Salvors called an expert witness by the name of Green, who was established as a professional salvor with wide experience. This witness, testifying hypothetically, opined that the barge would have gone upon the beach except for the salvage efforts of Crawford and Veerkamp; and he expressed the opinion that if there had been sufficient waves the barge would have contacted and damaged the seawall which protects the hotel improvements from the ocean.

In defending against the salvage claim, Carriers introduced a marine surveyor by the name of Hallbauer. He arrived at the Diplomat Hotel between 4:30 and 5:00 on the morning of October 31, accompanied by one, Walter Byrd, a professional salvor. Later in the morning Hallbauer and Byrd went to Port Everglades and arranged for the return of the El Mulo Grande. They were present when the El Mulo Grande took the barge into tow. Hallbauer was also present at the drydock at Port Everglades and was one of the parties who surveyed the tug for damage. Hallbauer's first hand familiarity with the condition of the barge as she laid in the shallow water in front of the hotel and with her recapture and her survey at Port Everglades is superior to that of any other witness. The Court regards Hallbauer as a knowledgeable and entirely credible witness and has relied heavily upon his testimony in resolving the salvage claim and other issues before the Court.

Hallbauer testified that at 5 o'clock on the morning of October 31st the tide was low, and that it was high at 11 o'clock that morning. Since the tide changes every six hours,

it was high at 11 p.m. on the night before, about the time when the barge was first observed by Crawford. The evidence shows, and the Court finds, that the barge successively contacted and crossed portions of groins Nos. 1, 2 and 3. Because Hallbauer found the barge afloat when he arrived at the hotel between 4:30 and 5 o'clock on the morning of October 31, at a time when the tide was low, it is logical and reasonable to believe, and the Court finds, that the barge never was fast aground, except intermittently when her bottom was over and hung upon one of the groins.

Hallbauer and witness Hartley, the marine superintendent for Carriers, both testified that when Crawford activated the pump a quantity of sand and shell was sucked into the pump and into the sea chest, which rendered the pumping apparatus ineffective to fill the ballast tanks. An examination of the tanks when the barge was dry docked at Port Everglades several days later revealed that the only tank aboard the vessel which had any appreciable amount of water in it was the No. 4 tank which was kept full of fresh water at all times. This testimony is uncontroverted.

The Court finds that the barge was not ballasted by the pumping operations which were initiated by Crawford and that the dropping of the anchor, with the anchor line vertically extended from the barge to the water, was ineffectual. The Court fully credits the testimony of the witness Hallbauer, who unequivocally testified that the salvage efforts of Crawford and Veerkamp did not prevent the barge from going ashore.

The Court is of the opinion that both Crawford and Veerkamp testified truthfully when they stated that the barge was grounded after they boarded her and while

she was over a portion of groin No. 3. At that particular time the movement of the stern of the barge was likely arrested by reason of its bottom being upon a groin. The evidence shows that her bottom was punctured and damaged in several places, obviously by the steel in the groins over which she passed.

Regardless of whether Crawford was motivated by a desire to protect the hotel property, and notwithstanding that his testimony was slanted in the direction of his own interest, his activities and those of Veerkamp on the night in question were commendable and heroic. However, the real issue is whether Crawford and Veerkamp are entitled to a salvage award. The requisites for a salvage award are:

1. There must have been a maritime peril from which the ship could not have been rescued without the salvor's assistance.

2. The salvor's act must have been voluntary, meaning that the salvor must be under no official or legal duty to render assistance, and

3. The efforts of the salvor must be successful in saving, or helping to save, at least a part of the property at risk.

The barge was obviously in peril and Crawford and Veerkamp did act voluntarily, but neither of them is entitled to an award because their efforts did not deliver the barge from peril, nor preserve it from damage, even partially. Gilmore and Black, The Law of Admiralty, 445, and Norris, The Law of Salvage, 148-159, ¶88-93, and cases there cited.

Having found that the activities of Crawford and Veerkamp were not successful in saving the barge or helping to save it from damage, the Court further finds and concludes that Crawford and Veerkamp are not entitled to an award and that their salvage claim must be dismissed with prejudice. The Court also finds that there is no evidence to support Carrier's counter-claim against the salvors or Hasam and that said counter-claim should be dismissed with prejudice.

TOWAGE CONTRACT

At the time of the casualty, the barge was being towed under a towing agreement between Carriers and Twenty Grand. The agreement was executed by West India Shipping Company, Inc., acting as the agent for Carriers. Initially, the liability of Twenty Grand turns on the validity of that portion of the agreement which required Carriers to secure hull and P and I insurance coverage wherein Twenty Grand and the tug would be named as co-insureds and which would provide for waiver of subrogation. That part of the agreement which pertains to this issue reads as follows:

> Owner (barge) agrees to procure, pay for and maintain in full force and effect throughout the terms of this agreement, hull and machinery insurance in an amount at least equal to the value of the vessel and full form protection and indemnity insurance with a limited amount of at least $1,000,000. Principal (tug) shall be named as an additional insured on all said policies and such policies shall contain a waiver of subrogation in favor of principal. (Italics supplied by Court.). Principal (tug) agrees to procure, pay for

> and maintain in full force and effect throughout the term of this agreement, hull and machinery insurance in an amount at least equal to the value of the barge, and full form protection and indemnity insurance with a limit of at least $1,000,000. Owner (barge), the vessel, its master and crew shall be named as additional assureds in all of said policies and such policies shall contain a waiver of subrogation in favor of owner, the vessel, its master and crew. Proper evidence of such insurance shall be furnished owner.

Counsel have stipulated that Carriers did not comply with this clause, in that it failed to have Twenty Grand or its tug named as an additional insured and it failed to purchase waiver of subrogation against Twenty Grand from its underwriters. It appears, however, that Twenty Grand did comply with its contractual obligation by having Carriers named as an additional insured and by securing waiver of subrogation.

Counsel for the barge has urged that the insurance provision in the towage agreement violates public policy and is void and unenforceable because it exculpates the tug and its owner from the negligence of the tug. Counsel for the tug, on the other hand, claim that this clause is not an exculpatory clause, but is merely an insurance requirement to be favored by public policy and that by breaching the towage agreement the barge should be precluded from recovery against the tug, which would have been fully protected by the insurance and waiver which the barge had contracted to procure.

In 1955 the Supreme Court of the United States in Bisso v. Inland Waterways Corporation, 349 U.S. 85, 75

S.Ct. 629, 99 L.Ed. 911 (1955), announced a judicial rule based on public policy which invalidated contracts that release towers from all liability for their own negligence. The creation and application of the Bisso rule has two purposes: (1) to discourage negligence by holding wrongdoers responsible for their own negligence, and (2) to protect those in need of services from being "overreached" by those with the power to "drive hard bargains."

The clauses in question in Bisso were not insurance clauses. The invalidated Bisso clauses were (1) a provision that towing would be at the "sole risk" of the barge, and (2) that the tug's master, crew and employees would, in the performance of their duties, become "employees" of the barge. Bisso v. Inland Waterways Corp.

The first of these clauses was the kind of towage-at-your-own-risk clause considered by the Court in The Steamer Syracuse, 12 Wall. 167, 20 L.Ed. 382 (1871) and later in [The Wash Gray,] Compania De Navegacion v. Firemen's Fund Ins. Co., 277 U.S. 66, 48 S.Ct. 459, 72 L.Ed. 787 (1928). In Bisso the Court considered these two earlier decisions, together with intervening Circuit Court decisions and invalidated the exculpatory clause on a public policy basis.

The second clause in the towage contract under consideration in Bisso created a fictitious employment of the tug's master and crew for the barge and was also invalidated. The Court in Bisso said:

> The second clause in the contract . . . likewise cannot be enforced. For if valid, the only effect of that clause would be to shift all liability for negligent

towage from the towboat to the vessel being towed, precisely what the first clause attempted to do.

> This is true because employees of the towboat do not become employees of a vessel being towed just because a contract says so, when as here the workers are in truth and in fact solely employees of the towboat. . . . The rule against contractual exemption of a towboat from responsibility for its own negligence cannot be defeated by the simple expedient of providing in a contract that all employees of a towboat shall be employees of the towed vessel when the latter "employment" is purely a fiction. Bisso v. Inland Waterways Corp., 349 U.S. at 94-95, 75 S.Ct. at 635.

A similar employment clause was also considered and invalidated by the Court in Boston Metals Co. v. The S/S Winding Gulf, 349 U.S. 122, 75 S.Ct. 649, 99 L.Ed. 933 (1955).

The fact that in Bisso the Court not only held invalid the direct "towage-at-your-own-risk" clause, but also the indirect attempt to exculpate the tug by use of the imputed negligence of an employee route is significant in the case at bar because by doing so the Supreme Court forbade tug owners from doing indirectly what could not be done directly.

The towage contract in the case at bar is not directly exculpatory. It is an indirect attempt at exculpation. The clauses of the towage agreement between Carriers and Twenty Grand are "insurance clauses." However, the effect thereof is the same as the Bisso-invalid clauses. Here, the

barge is obligated to not only fully insure itself, but also to immunize the tug against any claims of the barge's insurer by way of subrogation, or by direct action. The cost of this protection for the tug must be borne by the barge owner and an additional premium is of course, payable by the barge for the waiver of subrogation.

The Bisso doctrine was reiterated and adhered to by the Supreme Court in its 1963 decision in Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co., 372 U.S. 697, 83 S.Ct. 967, 10 L.Ed.2d 78 (1963), reversing 303 F.2d 237 (5th Cir. 1962). In Dixilyn, the towage agreement provided that barge owner would assume all liability for damages arising from towage, including any damage claims made by third parties. The District Court held the tower liable for third party claims, in spite of the contract provision. The Fifth Circuit Court of Appeals reversed, holding that the barge owner had entered into a valid contract to assume liability for losses arising from towage. In reversing the Court of Appeals, the Supreme Court said

> In treating as valid a contract which exempts the tower from liability for its own negligence, the Court of Appeals' holding is squarely in conflict with our holding in Bisso v. Inland Waterways Corp. [349 U.S. 85, 75 S. Ct. 629, 99 L.Ed. 911 (1965)], and Boston Metals Co. v. The Winding Gulf [349 U.S. 122, 75 S.Ct. 649, 99 L.Ed. 933 (1955)]. . . . We adhere to the rule laid down in Bisso and Winding Gulf. . . .

Following Dixilyn and Bisso, Chief Judge Connally of the Southern District of Texas in Offshore Company v. G & H Offshore Towing Co., 262 F.Supp. 282 (S.D.

Texas 1966) declined to hold valid and enforceable a Bisso-invalid towage-at-your-own-risk clause. In Judge Connally's case, the towage contract incorporated by reference the exculpatory provisions of the Carriage of Goods by Sea Act, 46 U.S.C. § 1304. Counsel for the tug urged Judge Connally to rule contrary to the Bisso line, but he "declined to be the first to overrule the Supreme Court on this question."

Certainly, this Court is in accord with the public policy favoring insurance. A contractual requirement that the barge must purchase insurance to protect itself or cargo owners against loss is not repugnant to the Bisso doctrine; but an agreement whereby the barge owner must also insulate the tug from liability to the barge insurer for negligence of the tug is violative of the Bisso doctrine.

Counsel for the tug has urged this Court to reconsider its decision in the light of Fluor Western, Inc. v. G & H Offshore Towing Co., 447 F.2d 35 (5th Cir. 1971) aff'g Case No. 70-H-208 (S.D. Texas 1970), and Tenneco Oil Co. v. Tug Tony, 324 F.Supp. 834 (S.D. Texas 1971). This Court is familiar with these decisions but declines to alter its decision, because on close inspection both Fluor Western and Tenneco Oil are distinguishable from the Bisso line.

Tenneco Oil involved a suit by a cargo owner against a carrier for loss of cargo. The Court therein held valid and not contrary to public policy the contract of affreightment provision requiring the cargo owner to procure cargo insurance and purchase a waiver of subrogation from the cargo underwriter. Tenneco was, however, a cargo case—not a towage case. As Judge Bue so aptly pointed out in his Tenneco opinion:

> Towage contracts which provide for a release from liability have been consistently distinguished from contracts of affreightment and charters which include insurance clauses and the waiver of subrogation rights.
>
> . . . The distinction between contracts of towage and affreightment is not arbitrary. Conceivably, the Bisso rule would apply even to contracts of affreightment if it was found that such contracts which relieved the carrier from liability for its own negligence were dictated by a "monopolistic power" or were products of overreaching. Tenneco Oil Co. v. Tug Tony, 324 F. Supp. at 837.

Fluor Western, Inc. v. G & H Offshore Towing Co., 447 F.2d 35 (5th Cir. 1971) is likewise distinguishable from the Bisso line of decisions. First, like Tenneco Oil, Fluor Western is a cargo loss case—not a tug-tow case. Second, in Fluor Western, the cargo insurer was by virtue of subrogation the real party in interest. The insurer brought suit in spite of the fact that it had earlier waived its subrogation rights. See also, Pure Oil Co. v. M/V Caribbean, 235 F.Supp. 299, 305 (W.D.La.1964).

Like my distinguished friend and brother judge, Chief Judge Connally, I too decline the urgent invitation to be the first to overrule the Supreme Court's opinion in Bisso v. Inland Waterways Corp., 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955) and subsequent decisions.

EXONERATION—NEGLIGENCE

The claims of Carriers and Hasam and Twenty Grand's petition for exoneration present the issue of

whether Twenty Grand and the tug were guilty of negligence which directly and proximately caused damage to the barge and the groins. That issue will be next discussed and resolved in this opinion.

Twenty Grand adduced five witnesses whose testimony bears on this issue of negligence, as follows: (1) Robert Thompson, Twenty Grand's operations manager, who had responsibility for and supervision over the maintenance of the tugs, (2) Harry Wilson, the tug's captain, (3) Larry Rebardie, the tug's mate, (4) Joseph Broussard, the tug's chief engineer, and (5) James Mansfield, a marine surveyor, who represented the cargo carrier and inspected the tug and barge immediately before the flotilla departed for Puerto Rico.

Thompson described and gave the dimensions of the tug, the towing winch and the tow cable. The tow cable was 1800 feet long; it was 1½ inches in diameter; it had a hemp core and was wrapped with six metal ropes, each of which rope is composed of 36 separate wires. The end of the tow cable nearest the barge connected with a nylon rope which was 250 feet in length, called a surge line or snatch line. The surge line has more elasticity than the tow cable; it absorbed the shock caused by a slack cable and from the surging action which developed when the barge was drawn through rough water. The tow cable and the surge line were connected by a device, which was referred to by the witnesses as a socket or thimble.

Thompson testified that when the cable was not in use it was wrapped upon a drum, located on the stern of the tug. According to his testimony, it was the duty of the captain to inspect the cable when it was payed out

and retrieved. He said that each tug is provided with a quantity of oil-graphite compound to be applied to the cable when rust is observed. On occasion the cable is turned end for end for the purpose of compensating for wear or corrosion which is apt to develop on the last 150 feet of the cable, that part most frequently in the water. Thompson stated that the tugs usually return to the home port at Morgan City, Louisiana every six months or so, where the tow cable is given a cursory inspection, unless a closer inspection is specified by the captain, "who has the final say." He testified that if the inspection of the cable reveals undue rust, burrs or broken strands, the cable is replaced. Thompson emphasized several times that the captain determines whether and when the tow cable is greased, reversed, repaired or changed.

Although Thompson had responsibility and supervision over the maintenance of Twenty Grand's tugs, he could not, or would not, say how many burrs or how much rust must exist to require a replacement of the cable. On several occasions when confronted with this question, he repeated that it was the captain's responsibility to make those decisions. Thompson admitted that although it was he who gave instructions to the captain and the crew of the tug, he made no investigation to ascertain whether his instructions were implemented. He also admitted that he did not know whether Captain Wilson was qualified to make an accurate judgment as to the condition of the cable and when it should be changed. He testified that there was no record at the tug's home port, or elsewhere, which showed how long the cable had been in use, when it had been lubricated, or whether it had ever been reversed or repaired. As far as he knew, the tow cable on the tug had

not been replaced since the tug was commissioned in 1966. Stated differently and more broadly, Twenty Grand had no records upon the tow cable in question.

Harry Wilson was the master of the tug upon this ill-fated voyage. He had never served upon her previously and has not been aboard her since. Although Captain Wilson testified that he personally inspected the cable when it was payed out and taken in, and that "there was nothing wrong with it", the evidence shows that the only inspection which Captain Wilson made of the cable, if in fact he did inspect it, was made while he was engaged with the tug's controls upon the upper deck some 10 or 12 feet from the winch and the cable drum, at a time when he was maneuvering the tug which was under way with the barge in tow. The Court finds that the testimony of Captain Wilson as to the condition of the tow cable has provided very little, if any, probative help.

Larry Rebardie sailed aboard the tug as mate. While at the Port of Palm Beach he saw the rust on the cable near the socket; but it was his opinion that the cable did not then need any lubricant, because it was his view that a cable is greased only when it is rusty all over. He then proceeded to testify that he is no expert on the condition of a cable, or when to change one. He testified that he had never lubricated a cable except at the home port in Morgan City; and that there was no lubricant aboard the tug on this voyage; nor was there an extra cable aboard. Except for seeing the rust on the cable near the socket, when it was pointed out to him by Mansfield, Rebardie made no inspection of the cable at the Port of Palm Beach or at the port at Puerto Rico, or while they were at sea.

The deposition of Joseph Broussard was read. He was the chief engineer aboard the tug. His testimony indicated that he had nothing to do with the cable, except to activate a hydraulic pump in the engine room which furnished power to pay out and retrieve the cable. As chief engineer, Broussard never inspected the cable. Neither did he keep any log upon it. His deposition testimony, like that of the other witnesses who testified for Twenty Grand, furnishes no basis upon which Twenty Grand could be exonerated. Conversely, the weight of the testimony of all of these witnesses demonstrates carelessness on the part of Twenty Grand and the crew of the tug in failing to properly inspect and maintain the cable.

Mansfield, the marine surveyor, who inspected the tug and the barge before it sailed from Palm Beach to Puerto Rico, testified that there was some rust upon the cable near its junction with the socket. It is quite clear that Mansfield inspected the cable only casually. Obviously, he was primarily concerned with the condition of the fittings at the end of the cable. Otherwise, he would have required the cable to be unwound and laid out so it could be visually inspected, which he did not do. His inspection revealed no more of the cable than the outer wrapping upon the drum. Nevertheless, Mansfield told the mate of the tug that the rusted portion of the cable must be cut off before the next voyage. The testimony of Mansfield impugns the testimony of Captain Wilson, who claims to have inspected the cable and found nothing wrong with it.

After the tow cable parted, the portion attached to the barge was retrieved by Carriers. It was stowed in a warehouse at the Port of Palm Beach until June of 1970, when it was sent to the Pittsburgh Testing Laboratory.

There it was examined and tested, after which it was returned to Carriers at the Port of Palm Beach, where it was again stored indoors until it was introduced into evidence at trial. Although the evidence shows that the tow cable was galvanized when first placed in use, there was no galvanizing apparent when the cable was inspected at the laboratory, nor was there any evidence upon or within the cable of any oil-graphite protective compound having been applied. The cable showed extensive corrosion, broken wires and general deterioration. Laboratory testing demonstrated that the original tensile strength of the cable had been substantially diminished by deterioration. The metallurgist who tested the cable found no evidence that its deteriorated condition resulted from being dragged across the bottom of the ocean or from being in contact with the groins in front of the hotel. The evidence shows, and the Court finds, that when the cable was tested at the laboratory its condition was substantially the same as when it was removed from the barge.

After the tug recaptured the barge, and while the tug was at Port Everglades, Captain Wilson cut 100 feet from the end of the towing cable which had been taken aboard the tug, and stowed it in the forward hold. However, for some unexplained reason, that portion of the cable was not aboard the tug when she arrived in Morgan City and has never been produced, or even accounted for. So, there has been no testing of that portion of the cable. Moreover Twenty Grand apparently made no effort to do its own testing upon that portion of the cable which was retrieved by Carriers.

Prior to and during the trial, Twenty Grand abandoned its earlier defense of heavy weather and stipulated

that the condition of the weather would not be relied upon in defense of the claims. The prevailing weather conditions on the night in question were not extraordinary. Obviously then, the cable failed because it could not stand the strain which was then placed upon it. The weight of the evidence shows and the Court finds that the cable parted because of the negligence of Twenty Grand and the crew of the tug in failing to regularly and properly inspect, lubricate and reverse the cable and in failing to replace it when it became weakened by deterioration.

CARRIERS' DAMAGES

As a result of the casualty, the barge was drydocked at Port Everglades on November 2, at which time and place she was surveyed with all interested parties participating. This was a complete survey, except for her internals. The word "internals" means and includes her ribs and interior bottom. The survey was signed by all interested parties, including Twenty Grand and Carriers. In conducting this survey, the individual most in charge was Mansfield, who represented the U. S. Salvage Association. The survey indicated that the costs of repairing the damage of the vessel caused by the failure of the cable would be approximately $100,000, which estimate did not include the cost of repairing the internals.

At the election of Carriers, only temporary repairs were effected at Port Everglades. The permanent repairs were deferred until the barge's next scheduled haulout. The total bill for temporary repairs at Port Everglades attributable to the casualty was in the amount of $4,448.64. In addition thereto, Carriers was billed and paid the sum of $152.74 to the Port Everglades Authority for dockage

and harbor master fees. Both bills were necessarily incurred and are reasonable in amount. Carriers had a cargo contract to fulfill and by limiting the repairs at Port Everglades to temporary repairs, Carriers was able to continue in the performance of that contract and to minimize damages.

Upon completion of the temporary repairs, the barge received a certificate of seaworthiness and on November 3rd she continued in her normal trade. In mid-November the barge encountered heavy weather and sustained topside damages, but not of such severity as to interfere with her continuing in trade. However, in late January and early February, 1970, the barge again encountered heavy weather and again sustained damage to her topside, so extensive that it was necessary to withdraw her from trade and place her in a shipyard for repairs.

The barge was originally constructed at the Livingston Shipyard in Orange, Texas. After being damaged in late January and early February, she was taken to that shipyard where repairs were made simultaneously to her topside and to her bottom. At the trial it was stipulated that she sustained no damages to her topside as a result of the parting of the cable on the night of October 30, and that she sustained no damages to her bottom from the two heavy weather episodes. The barge arrived at the Livingston Shipyard on February 10, 1970. She was drydocked on February 18 and undocked on April 8. She departed that shipyard on April 13.

It was stipulated that it took 21 work days at the Livingston yard to repair the damages which the barge received as a result of the cable failure. No overtime was

paid to the Livingston Shipyard. The total charge by Livingston for the repairs to the barge's bottom was $137,802. Thus, the actual costs of repairing the damages which were caused by the parting of the cable exceeded the Port Everglades estimate by more than $37,000; but, as previously stated, the Port Everglades estimate did not include the costs of repairing the internals. Surveyor Mansfield, who was in charge of the Port Everglades survey, testified that neither he nor the others of that survey party went into the double bottoms of the barge. He stated that when the survey was made in Port Everglades he did not know that the interior bottom of the barge had a special wax coating and that the costs of removing and replacing this special coating was not included in the Port Everglades survey. Mansfield also agreed that the Port Everglades survey estimate did not include any structural work within the internals nor did it include any plates which were found to be damaged. He conceded that the quality of marine work varies in different shipyards, and that costs likewise vary. He conceded that the Port Everglades estimate was based on costs at Port Everglades and not upon costs at the Livingston yard. As earlier observed, Carriers' decision to defer the permanent repairs was entirely justified. The Court can find no fault with Carriers' decision to return the barge for permanent repairs at Livingston, where the barge was originally constructed. It nearly always happens that the cost of repairs, whether to a vessel, an automobile or something else, exceeds the earlier estimate. There was no proof that the Livingston Shipyard overcharged for the repairs which were made necessary by the parting of the cable. In the absence of such evidence, the charge made by Livingston in the sum of $137,802 is found to be reasonable and is approved by the Court.

The evidence shows and the Court finds that the following items of expense were also necessarily incurred and that the charges are reasonable: Surveyor Hallbauer —$787.50; U.S. Salvage Association Survey—$831.00; and American Bureau of Shipping Survey—$302.81.

Walter Byrd, the salvor who was employed by Hallbauer at the request of Carriers, was paid the sum of $4,500. It is clear that Byrd and his two sons rendered valuable and necessary services. The Court has calculated that the three of them were on the job in connection with the salvage operation for a total of approximately 35 hours, and the Court is not unmindful that one of Mr. Byrd's sons swam a tow line from the tug to the barge, and thereby made it possible for the tug to pull the barge from the shallow water into the ocean to safety. However, that act is considered by the Court to be routine and not hazardous. It appears to the Court that a charge of $4,500 for services by Byrd and his sons as salvors is excessive. It is within the province of the Court to establish reasonable compensation for the salvors and the Court has sufficient evidence for that purpose. The Court finds that the sum of $3,000 is reasonable compensation for the services which were rendered by Mr. Byrd and his sons.

In addition to the foregoing, Carriers claims damages in the amount of $6,900 for loss of use of the barge during the two days that it was drydocked at Port Everglades and the 21 days when it was drydocked in Texas. To support this claim, Carriers contends that during that period the tug was under demise charter by Carriers from States Marine at a daily hire of $400 (Carriers is a wholly owned subsidiary of States Marine); but Carriers offered no proof that it was billed for or paid to States Marine daily

hire at that price, or any other price, while the barge was in drydock. As further support for this item, Carriers points to an affreightment agreement which it had with a third party for the carriage of cargo to Puerto Rico, which agreement apparently provided for lay days or free time for discharge beyond which demurrage accrued at $2,000 per day and that the demurrage included tug expense of $925 per day; however there is no proof that any such tug expense was charged to or paid by Carriers. Carriers computes the claim of $6,900 for loss of use by arbitrarily claiming the sum of $300 per day for 23 days. In the absence of other satisfactory proof, the proper measure of damages for the period while the tug was in drydock would be the profits or earnings which the tug lost as a result of being so detained. Loss of profits must be shown with reasonable certainty, which would of course include a showing that the vessel would have been profitably employed if she had not been in drydock. No such showing was made by Carriers. No satisfactory effort was made to prove the earnings or profits, if any, which Carriers lost as a result of the barge being in drydock. In this connection, it is significant that during the course of discovery Twenty Grand moved for and the Court ordered Carriers to produce all records concerning the earnings of the barge immediately prior to and subsequent to the casualty but that Carriers failed to produce such records either before or during the trial. For these reasons, Carriers' claim of loss of use of the barge is denied.

Accordingly, the Court finds that as a direct and proximate result of the casualty, Carriers suffered and is entitled to recover from Twenty Grand damages as follows:

For temporary repairs at Port Everglades	$ 4,448.64
Dockage and harbor master fees at Port Everglades	152.74
Services by surveyor Hallbauer	787.50
Salvage services by Walter Byrd and his sons	3,000.00
U. S. Salvage Assn. survey	881.00
American Bureau survey	302.81
Bottom repairs by Livingston Shipyard	137,802.00
Total	$147,324.69

Pursuant to a stipulation of counsel at trial consideration of Carriers' claim for attorneys' fees, and all other claims for attorney fees, has been reserved for a supplemental Hearing.

HASAM'S DAMAGES

At the outset, the Court finds that the hotel and country club property is owned by Hasam; and that in 1957 Hasam, as the owner of the upland, secured a permit from the U. S. Army Corps of Engineers to construct the four groins from the upland into the foreshore of the ocean for a distance of 200 feet, and that the groins were constructed by Hasam in conformity with that permit. The

Court finds and concludes as a matter of law that a littoral or upland owner has the right to construct groins into the ocean, provided a permit therefor is first obtained from the Corps of Engineers; and the Court finds and concludes that Hasam has a property interest, in and to the groins which permits it to claim and recover for damages to the groins directly and proximately resulting from the negligence of others.

The evidence shows that in September 1969 Hasam entered into a contract with Dock and Marine Construction Corp. for repairs to all four groins. Pursuant to that contract, the construction company was obligated to provide all labor, materials, equipment and insurance necessary to repair the groins for the sum of $7,500, to be paid by Hasam. In accordance with that contract, the construction company undertook the work and repairs to groins 1 and 2 had been been completed when the groins were damaged by the barge on October 30, 1969.

The evidence shows that as the barge drifted into the shallow water in front of the hotel, it contacted and damaged groins 1, 2 and 3, in that order. As it moved upon and over each of these groins, it broke and flattened the greenheart timbers and the steel sheeting in such a way as to destroy 25 lineal feet of groin number 1, 75 lineal feet of groin number 2, and 125 lineal feet of groin number 3. There was no damage to groin number 4.

During December 1969, Hasam secured from Reed Construction Company an estimate for the repair of groins 1, 2 and 3, in the amount of $141,563. The president of the Reed Company, John Bettendorf, testified that said sum was a reasonable price for the repair of the groins.

He testified that when the groins were constructed in 1957 they had a life expectancy of between 20 and 30 years. He also testified that the groins were performing their intended function at the time of the casualty. Bettendorf is a graduate engineer, 31 years of age, with experience in the construction and repair of groins and other heavy marine construction.

Twenty Grand countered the testimony of Bettendorf by calling as an expert witness, Andrew Potter. He too is a graduate engineer, employed by Engineered Products, Inc., a company which has over a period of years constructed groins and performed other types of heavy marine construction in this area. His credentials are very imposing. He testified that the groins in question has a life expectancy of 10 years and that when they were damaged by the barge they were deteriorated and fully depreciated. So, we have two groin construction witnesses whose testimony is completely different and apparently irreconcilable, as it speaks to the life expectancy of the groins and the condition of the groins at the time of the casualty and as to the cost of repairing the groins.

As previously stated, Bettendorf's company gave an estimate in December of 1969 for the repair of the groins in the sum of $140,563. Potter testified that in December of 1970 his company would have repaired the groins for the sum of $87,192, and that his company would repair the groins in May of 1972 for the sum of $100,995. While testifying, Potter advised the Court that he would firmly commit his company to repair the groins at that price provided his offer was accepted within thirty days thereafter.

The primary differences between the estimates of Bettendorf and Potter apparently result from the different methods which their companies would employ in repairing the groins and the consideration given by each to the possibility of work being delayed and expense increased by adverse weather conditions. Bettendorf testified that his company would construct a trestle along each groin which would provide a platform from which the work would be done, whereas Potter testified that his company would perform the repairs by the use of a sunken barge which would serve as a platform for the performance of the work. Bettendorf testified that his company increased the cost of its estimate to cover loss of time and increased expense resulting from bad weather, whereas Potter testified that his company added nothing to its contract to cover that contingency.

In addition to these two differences, Hasam insists that the Bettendorf estimate is superior to that of Potter in a variety of ways, some of which will be here mentioned. Among other things, Hasam relies upon Bettendorf's testimony to the effect that a sunken barge would provide an extremely unstable platform for a crane and other equipment and material, necessary for the repairs; Hasam complains that the Potter estimate is written in such a way as to add to the contract price additional costs which might accrue, whereas the contract price offered by Bettendorf is fixed and certain; Hasam insists that the Bettendorf estimate affords greater insurance protection from theft and damage by the elements; and Hasam emphasizes that the Bettendorf company uses union labor whereas the Potter company uses non-union labor. An analysis of the testimony of these two witnesses, along with the exhibits that relate thereto, demonstrates that

Bettendorf's estimate is in some respects superior to the Potter proposal. However, the Court cannot ignore the fact that the firm bid offer of Potter is about $50,000 less than the Bettendorf estimate, for the performance of the repairs in 1971, at a time when all labor and material costs have increased. In this connection it is significant to note that in December of 1969, Hasam did not ask for or receive competitive bids, but sought and received only the Bettendorf estimate.

Assuming that the Bettendorf estimate provided Hasam with greater security than the Potter proposal, as the Court must, the Court finds that on a competitive bid basis Hasam could have repaired the groins in December of 1970 for substantially less than the sum of $141,563, which was the Bettendorf estimate. However, the Court can readily understand that a convention hotel and golf club facility which caters to large conventions could ill afford a work interruption, or any other strife, which might result from the use of non-union labor. Considering this factor, along with the other aspects in which the Bettendorf estimate is preferable to the Potter proposal, the Court finds that on a competitive bid basis the cost of repairing the groins in December of 1970 would have exceeded the Potter estimate which was $87,192.

Taking these factors into consideration, and working within the confines of the evidence upon this issue, the Court is of the opinion and finds that by seeking competitive bids Hasam could have repaired the groins in 1970 with union labor, under a contract which would have provided the protections which are absent in the Potter estimate, at a price of approximately $100,000. In reaching this conclusion, the Court has carefully considered,

and attempted to apply in a common sense way, all of the evidence in the case that bears on this issue.

The Court is in complete disagreement with the witness Potter as to the life expectancy of the groins, and as to their condition at the time of the casualty. Although Potter testified that the groins were ineffective and that their lifespan had expired, upon cross examination he was compelled to concede that when he inspected the groins some eighteen months after the casualty, and at a time when the barge damage to the groins had not been repaired, the groins were performing the function for which they were constructed and that the beach in front of the hotel was then satisfactory and stable. Germane to this aspect of the case is the evidence which shows that during October of 1969 the groins were being repaired at a total cost of $7,500, and that the repair of two of them had been completed when they were damaged by the barge. In this regard, the Court finds the testimony of Bettendorf to be more credible and reliable than that of Potter. For some strange reason, Potter tried to persuade the Court that these groins had no value at the time of the casualty, but the evidence, including his own testimony, shows the contrary. The Court finds that at the time they were damaged by the barge the groins had a further life expectancy of 12 years, perhaps more with proper maintenance. Hence, the groins were 50% depreciated at that time. Accordingly, Hasam is entitled to recover $100,000 as the cost of repairing the groins less depreciation to the extent of 50%, or a total recovery of $50,000.

Finally, there is no evidence to support the claim of Hasam against Carriers for damages to the groins—nor is there any evidence to support Carrier's counterclaim

against Hasam for damage to the barge. Both claims will be dismissed with prejudice.

CONCLUSION

Collectively or separately, counsel for the parties shall prepare and submit to the Court judgment forms to be entered in each of the pending cases in conformity with the findings and conclusions which are set forth in this Memorandum Opinion.

In re Complaint of TWENTY GRAND OFFSHORE, INC.,

Plaintiff,

Owner of TUG EL MULO GRANDE, Official No. 505240, in an action for exoneration from or limitation of liability,

Petitioner.

Civ. No. 70-591.

United States District Court,
S. D. Florida.

May 25, 1971.

Reconsideration Denied Aug. 4, 1971.

FULTON, Chief Judge.

This cause came before the Court upon petitioner Twenty Grand Offshore's motion for summary judgment against claimant West India Carriers, Inc.

This is a limitation action brought by Twenty Grand Offshore as owner of the tug "El Mulo Grande." One of the claimants herein is West India Carriers, owner or charterer of the barge "Wisco Ranger," which was under tow by the tug "El Mulo Grande" when the hawser parted and the barge allegedly drifted ashore damaging itself and certain beach groins.

Petitioner Twenty Grand has moved for summary judgment against West India on the ground that West India breached their towage agreement by failing to obtain

insurance in accord with clause #3 of the agreement. According to petitioner, because of this breach, West India cannot now recover damages from the tug which would have been covered by one of the clause #3 policies of insurance.

Clause #3 provides:

> Owner [barge] agrees to procure, pay for and maintain in full force and effect throughout the terms of this agreement, hull and machinery insurance in an amount at least equal to the value of the vessel and full form protection and indemnity insurance with a limited amount of at least $1,000,000. Principal [tug] shall be named as an additional insured on all said policies and such policies shall contain a waiver of subrogation in favor of principal. Principal agrees to procure, pay for and maintain in full force and effect throughout the terms of this agreement, hull and machinery insurance in an amount at least equal to the value of the barge, and full form protection and indemnity insurance with a limit of at least $1,000,000. Owner, the vessel, its master and crew shall be named as additional assureds in all of said policies and such policies shall contain a waiver of subrogation in favor of owner, the vessel, its master and crew. Proper evidence of such insurance shall be furnished owner.

Counsel have stipulated that West India did not comply with clause #3, in that it failed to have Twenty Grand or its tug named as an additional insured in the policies it obtained, and it failed to purchase waivers of subroga-

tion against Twenty Grand from the underwriters. The issue is whether clause #3 is valid and enforceable, or whether it violates public policy by exculpating the tug and its owner from the negligence of the tug.

According to Gilmore & Black, The Law of Admiralty § 7-15, the operators of tugboats have long sought to immunize themselves from the effects of their negligence by providing in their towage contracts that towage would be at the sole risk of the tow. In 1955, however, the Supreme Court held such clauses invalid in Bisso v. Inland Waterways Corp., 349 U.S. 85, 75 S.Ct. 629, 99 L.Ed. 911 (1955). Reviewing older cases dealing with such clauses, the Court concluded that they "strongly point to the existence of a judicial rule, based on public policy, invalidating contracts releasing towers from all liability for their negligence." According to the Court, the two main reasons for the creation and application of this rule are (1) to discourage negligence by making wrongdoers pay for their negligence, and (2) to protect those in need of services from being "overreached" by those with the power to "drive hard bargains" and to help them obtain towage "free of monopolistic compulsions."

The Supreme Court adhered to the Bisso rule in its 1963 case, Dixilyn Drilling Corp. v. Crescent Towing & Salvage, 372 U.S. 697, 83 S.Ct. 967, 10 L.Ed.2d 78 (1963), rev'ing 303 F.2d 237 (5th Cir. 1962).

Another clause in the towage contract considered by the Court in Bisso provided that the master, crew, and employees of the tug would be "servants" of the tow. As such, their negligence would be imputed to the tow. The Court looked through this fictitious employment. The

Court invalidated this clause, holding it would indirectly have the same effect as the tow-at-your-own-risk exculpatory clause. See also, Boston Metals Co. v. The Winding Gulf, 349 U.S. 122, 75 S.Ct. 649, 99 L.Ed. 933 (1955).

It is claimed by petitioner Twenty Grand that clause #3 presented herein is not the same kind of contract condemned by Bisso and later cases. Clause #3, according to the petitioner, is merely an insurance clause. Claimant West India, on the other hand, argues that the present benefit-of-insurance clause is but a new twist on the old Bisso-invalid exculpatory clause, for it has the indirect effect of eliminating the tug's liability for its negligence at the expense of the tow.

The Court is impressed with the argument of claimant West India. Towage contracts have been found to be contracts of adhesion, the entry into which is surrounded by "monopolistic compulsions," and clauses absolving the tower from its own negligence are void as contrary to public policy. The result of clause #3, presented herein, is no different from the invalid Bisso exculpatory clause. It merely seeks to do indirectly what it cannot do directly. Where the tow must buy insurance and name the tower as co-insured and purchase a waiver of subrogation against the tower, the tower would be absolved from any expense in connection with its negligence. The tow would pay the premiums to protect the tug; the negligent party would not have to pay for its damages. However, negligence is to be discouraged by making the negligent party pay for its wrongdoing. The Bisso clause and clause #3 presented herein are one and the same—both shield the tug from its own carelessness. See, 46 U.S.C. § 1303(8) (COGSA,

invalidation of benefit of insurance clauses). Contra Slade, Inc. v. Samson Towing Co., 327 F.Supp. 555 (E.D. Texas 1970); Fluor Western, Inc. v. G & H Offshore Towing Co., Case No. 70-H-208 (S.D. Texas 1970). This Court will not overrule the Supreme Court, and in the absence of a showing of why Bisso is inapplicable, it is

Ordered and adjudged that petitioner Twenty Grand's motion for summary judgment be and the same is hereby denied.

ON MOTION FOR RECONSIDERATION

This cause came on for hearing on Plaintiff, Twenty Grand Offshore, Inc.'s Motion for Reconsideration of the Court's Order dated 24 May 1971, filed 25 May 1971, denying Plaintiff's Motion for Summary Judgment. The parties appeared by counsel and the Court has considered the memorandums and the argument of counsel. Neither party desires to introduce further evidence.

Plaintiff's Motion for Reconsideration is bottomed on Fluor Western Inc. v. G. & H. Offshore Towing Co., Case No. 70-H-208 (S.D. Texas 1970), affirmed per curiam (5th Cir., 1971) 447 F.2d 35. In Fluor it developed that Fluor's cargo insurer was by virtue of subrogation the real party in interest in whose name—not Fluor—the action was actually brought, see Compagnie De Navigation Fraissinet & Cyprien Fabre S.A. v. Mondial United Corp. (5th Cir. 1963) 316 F.2d 163, 172. It further appeared that Fluor's cargo insurer, the real party in interest plaintiff, voluntarily waived its subrogation in dealings with its insured Fluor and not as a party to the towage agreement. This being so the Bisso and subsequent cases were

held to have no application contra to the contention advanced by the cargo interests in Fluor. In the instant case before the Court, the Plaintiff in limitation seeks to enforce insurance contractual provisions in the towage agreement against claimant, Carriers, who did not perform the provisions and no underwriter of whom waived, voluntarily or otherwise, subrogation against Twenty Grand.

The Court is of the opinion that the holding in Fluor is distinguishable from the present case before the Court in that here there is no waiver of subrogation by an insurer and plaintiff, Twenty Grand, seeks to enforce provisions of a towage agreement against a party to the towage agreement to which the Bisso line of decisions are applicable, see Offshore Company v. G. & H. Offshore Towing Co., Inc. (D.C.S.D. Tex. 1966) 262 F.Supp. 282, 287, as held in this Court's Order to which Plaintiff's Motion for Reconsideration is directed.

It is therefore ordered:

That Plaintiff's Motion for Reconsideration is denied.